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5 UNITED STATES DISTRICT COURT
6 DISTRICT OF NEVADA

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8 MAX T. CARTER, JR., and SUNDAE L.
9 CARTER, Husband and Wife, as Joint
Tenants,

Case No. 3:17-cv-00594-MMD-WGC

10 Plaintiffs,

ORDER

11 v.

12 SABLES, LLC, A Nevada Limited Liability
13 Company; H&R BLOCK MORTGAGE
14 CORPORATION; COUNTRYWIDE HOME
LOANS, INC.; CWALT, INC.; THE BANK
15 OF NEW YORK MELLON AS TRUSTEE
FOR SECURITIZED TRUST
16 ALTERNATIVE LOAN TRUST 2006-21CB
TRUST; COUNTRYWIDE HOME LOAN
17 SERVICING, LP; BANK OF AMERICA,
N.A.; and DOES 1 THROUGH 100
18 INCLUSIVE, *et al.*,

Defendants.

19
20 **I. SUMMARY**

21 Pending before the Court are Defendants Bank of America, N.A., Countrywide
22 Home Loans, Inc., CWALT, Inc., The Bank of New York Mellon as Trustee for
23 Securitized Trust Alternative Loan Trust 2006-21CB Trust, Countrywide Home Loan
24 Servicing LP, and Sable LLC's Motion to Dismiss Plaintiff's Complaint ("MTD") (ECF No.
25 9)¹ and Plaintiffs' Motion for Temporary Restraining Order ("TRO Motion") (ECF No. 3).²

26 ¹ADA Services Corporation, formerly known as H&R Block Mortgage
27 Corporation, joined the MTD. (ECF No. 16.) The other parties did not oppose the
joinder. (ECF No. 17.)

28 ²Neither Plaintiffs nor Defendants filed responses to the two motions.

1 For the reasons discussed below, Defendants' MTD is granted and Plaintiffs'
2 TRO Motion is denied as moot.

3 **II. BACKGROUND**

4 Plaintiffs Max and Sundae Carter commenced this action on September 26,
5 2017, against a variety of Defendants including Sables, LLC ("Sables"), H&R Block
6 Mortgage Corp. ("H&R Block"), Countrywide Home Loans, Inc. and Countrywide Home
7 Loan Servicing, LP ("Countrywide"),³ the Bank of New York Mellon ("BNYM"), Cwalt,
8 Inc. ("Cwalt"), and Bank of America, N.A. ("BANA"). (ECF No. 1.)

9 Plaintiffs took out a mortgage loan with H&R Block in 2006 in the amount of
10 \$209,600 to purchase real property located at 2202 Idaho Street, Carson City, Nevada
11 ("the Property"). (See ECF No. 1 at ¶¶ 8, 32-33, 44.) The mortgage loan was secured by
12 a deed of trust ("DOT") on the Property. (*Id.* at ¶ 33.) The first notice of default was filed
13 with the Carson City Recorder's Office on November 5, 2010, and a second notice was
14 filed on May 15, 2015. (*Id.* at ¶¶ 35, 39.)

15 Plaintiffs are challenging the securitization of their mortgage loan and the various
16 assignments of the promissory note ("the Note") and DOT. (See *id.* at ¶¶ 20, 22-27.)
17 Plaintiffs bring eleven claims for relief: (1) Defendants' lack of standing and wrongful
18 foreclosure;⁴ (2) unconscionable contract against Defendant H&R Block; (3) breach of
19 contract against H&R Block/MERS⁵; (4) breach of fiduciary duty against H&R Block; (5)
20 quiet title against all Defendants; (6) slander of title against all Defendants; (7) civil
21 conspiracy against all Defendants; (8) violation of the federal Racketeer Influenced and
22 Corrupt Organizations Act ("RICO") against all Defendants; (9) violation of the Nevada
23 ///

24 ³Defendants note in the MTD that "Countrywide Home Loan Servicing, LP was
25 previously changed to BAC Home Loan Servicing and merged de jure to Bank of
America, N.A [sic] as of July 1, 2011." (ECF No. 9 at 1.)

26 ⁴This claim also includes allegations against Mortgage Electronic Registration
27 Systems, Inc. ("MERS"). (ECF No. 1 at 12-14.) However, MERS is not a named
defendant in this action.

28 ⁵Again, MERS is not a named defendant in this action.

1 RICO statute; (10) temporary restraining order and injunctive relief;⁶ and (11)
2 declaratory relief.⁷ (ECF No. 1 at 11-24.)

3 **III. MOTION TO DISMISS**

4 **A. Legal Standard**

5 Under Rule 12(b)(6), a complaint may be dismissed for “failure to state a claim
6 upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pleaded
7 complaint must provide “a short and plain statement of the claim showing that the
8 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550
9 U.S. 544, 555 (2007). The Rule 8 notice pleading standard requires Plaintiff to “give the
10 defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Id.*
11 (internal quotation marks and citation omitted). While Rule 8 does not require detailed
12 factual allegations, it demands more than “labels and conclusions” or a “formulaic
13 recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
14 (2009) (quoting *Twombly*, 550 U.S. at 555). “Factual allegations must be enough to rise
15 above the speculative level.” *Twombly*, 550 U.S. at 555. Thus, to survive a motion to
16 dismiss, a complaint must contain sufficient factual matter to “state a claim to relief that
17 is plausible on its face.” *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted).

18 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
19 apply when considering motions to dismiss. First, a district court must accept as true all
20 well-pleaded factual allegations in the complaint; however, legal conclusions are not
21 entitled to the assumption of truth. *Id.* at 678. Mere recitals of the elements of a cause of
22 action, supported only by conclusory statements, do not suffice. *Id.* Second, a district
23 court must consider whether the factual allegations in the complaint allege a plausible
24 claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint

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26 ⁶A temporary restraining order and injunctive relief are not independent claims for
27 relief; rather, they are remedies that may be granted when an underlying legal claim has
28 merit.

⁷Similarly, declaratory relief is a remedy and not a legal claim. *See supra* n.6.

1 alleges facts that allow a court to draw a reasonable inference that the defendant is
2 liable for the alleged misconduct. *Id.* at 678. Where the complaint does not permit the
3 court to infer more than the mere possibility of misconduct, the complaint has “alleged
4 — but it has not show[n] — that the pleader is entitled to relief.” *Id.* at 679 (internal
5 quotation marks omitted). When the claims in a complaint have not crossed the line
6 from conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at
7 570. A complaint must contain either direct or inferential allegations concerning “all the
8 material elements necessary to sustain recovery under *some* viable legal theory.” *Id.* at
9 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1989)).

10 A motion to dismiss “grounded in fraud under Rule 9(b) for failure to plead with
11 particularity is the functional equivalent of a motion to dismiss under Rule 12(b)(6) for
12 failure to state a claim.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir.
13 2003) (internal quotation marks omitted). “Because a dismissal of a complaint or claim
14 grounded in fraud for failure to comply with Rule 9(b) has the same consequence as a
15 dismissal under Rule 12(b)(6), dismissals under the two rules are treated in the same
16 manner.” *Id.*

17 **B. Discussion**

18 Defendants argue, *inter alia*, that the complaint fails to comply with Federal Rules
19 of Civil Procedure 8 and 12(b)(6) and that Plaintiffs’ claims are time-barred. (ECF No. 9
20 at 5-13.) The Court agrees with Defendants that the complaint fails to state a plausible
21 claim for relief under Rule 12(b)(6). Plaintiffs’ complaint is based on legal theories that
22 have been resoundingly rejected by the Nevada Supreme Court, other courts in this
23 district, and the Ninth Circuit Court of Appeals. Specifically, the bases for Plaintiffs’
24 claims stem from the contention that their mortgage was improperly securitized and/or
25 assigned, and that splitting the Note and DOT invalidated any Defendant’s authority to
26 foreclose upon the Property. Therefore, the Court finds that dismissal with prejudice is
27 warranted as to all of Plaintiffs’ claims, as amendment would be futile.

1 **1. Lack of Standing to Foreclose/Statutorily Defective Foreclosure⁸**

2 Plaintiffs bring their first claim against all Defendants, alleging that Defendants do
3 not have standing to foreclose upon the Property as “each of them[] have failed to
4 perfect any security interest in the [] Property.” (ECF No. 1 at ¶ 46.) The Court
5 construes this as an attempt to advance a theory of improper securitization and/or
6 assignment in order to attack particular Defendants’ standing to foreclose upon the
7 Property. Plaintiffs also allege that “MERS lacked authority . . . to assign Plaintiffs’ Deed
8 of Trust, making any assignment from MERS defective.” (*Id.* at ¶ 54.)

9 Neither theories have any merit. To begin, “[t]he securitization argument has
10 been repeatedly rejected by this district because it does not alter or change the legal
11 beneficiary’s standing to enforce the deed of trust.” *Beebe v. Fed. Nat. Mortg. Ass’n*,
12 No. 2:13-cv-311-JCM-GWF, 2013 WL 3109787, at *2 (D. Nev. June 18, 2013). In
13 addition, a homeowner lacks standing to challenge the validity of a loan assignment.
14 *Wood v. Germann*, 331 P.3d 859, 861 (Nev. 2014). Finally, the Ninth Circuit has
15 resoundingly rejected the argument “that all transfers of the interests in the home loans
16 within the MERS system are invalid because the designation of MERS as a beneficiary
17 is a sham and the system splits the deed from the note,⁹ and, thus, no party is in a

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⁸The tort of wrongful foreclosure may be brought only where the power of sale is
19 exercised or a foreclosure actually occurs, see *Collins v. Union Fed. Sav. & Loan Ass’n*,
20 662 P.2d 610, 623 (Nev. 1983), and the complaint does not allege that a foreclosure
has, in fact, transpired.

21 ⁹Nevada law permits deeds of trust and promissory notes to be severed from one
22 another and independently transferred without impairing the ultimate right to foreclose.
23 *Edelstein v. Bank of New York Mellon*, 286 P.3d 249, 258-60 (Nev. 2012). In order to
24 foreclose upon a deed of trust, the party seeking foreclosure must demonstrate at the
25 time of foreclosure that it is both “the current beneficiary of the deed of trust and the
26 current holder of the promissory note,” *id.* at 255, or that it is the named beneficiary of
27 the deed of trust acting as agent for the note holder, see *In re Montierth v. Deutsche*
28 *Bank*, 354 P.3d 648, 651 (Nev. 2015). Moreover, the venue to challenge a failure of the
foreclosing entity to join the note and deed of trust at the time of foreclosure or to
demonstrate it is in an agency relationship with the holder of the note is generally
through Nevada’s foreclosure mediation program. See, e.g., *Bergenfield v. Bank of*
America, 302 P.3d 1141 (Nev. 2013). Defendants’ MTD also notes that Plaintiffs failed
to timely file an appeal of the final decision in the Nevada foreclosure mediation
program and are therefore estopped from challenging the legal basis for the foreclosure.
(ECF No. 9 at 5-6.)

1 position to foreclose.” *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034,
2 1044 (9th Cir. 2011). “Even if MERS were a sham beneficiary, the lenders would still be
3 entitled to repayment of the loans and would be the proper parties to initiate foreclosure
4 after the plaintiffs defaulted on their loan[].” *Id.*

5 Plaintiffs’ first claim is therefore dismissed with prejudice as to all Defendants.

6 **2. Unconscionable Contract**

7 Plaintiffs’ second claim for relief appears to be a claim of “unconscionable
8 contract” against H&R Block. (See ECF No. 1 at 14-15.) The Court finds that Plaintiff
9 fails to state a claim for relief and that amendment would be futile as this claim is time
10 barred.

11 “A contract is unconscionable only when the clauses of that contract and the
12 circumstances existing at the time of the execution of the contract are so one-sided as
13 to oppress or unfairly surprise an innocent party.” *Bill Stremmel Motors, Inc. v. IDS*
14 *Leasing Corp.*, 514 P.2d 654, 657 (Nev. 1973). Under Nevada law, both procedural and
15 substantive unconscionability must be present in order for a court to exercise its
16 discretion to refuse to enforce a contract or a contractual clause. See *D.R. Horton, Inc.*
17 *v. Green*, 96 P.3d 1159, 1162 (Nev. 2004). While substantive unconscionability focuses
18 on the one-sidedness of the contract’s terms, procedural unconscionability involves the
19 use of fine print or complicated, incomplete, or misleading language that fails to inform a
20 reasonable person of the contractual language’s consequences. *Id.* at 1162-63. The
21 time in which to bring a claim for unconscionability of contract is six years. NRS §
22 11.190(1)(b).

23 Plaintiffs make several statements regarding the actions of H&R Block. First, they
24 state that “H&R Block . . . presented in the origination of the purported loan that specific
25 criteria such as FICO score and other industry standard underwriting requirements must
26 be met to qualify for a loan of money for the subject property from H&R Block.” (ECF
27 No. 1 at ¶ 62.) Second, they state that H&R Block “presented in the origination of the
28 purported loan that a preliminary signature on the Mortgage loan contract was required

1 to 'lock in' an interest rate regarding the terms of the purported loan." (*Id.* at ¶ 63.) Third,
2 they state that H&R Block "failed to clarify in the terms of the Mortgage loan contract
3 that [H&R Block], the Originator on the contract, was in fact acting solely in the capacity
4 as an Accommodated Party account debtor beneficiary for a purported loan of money"
5 and "concealed they were financially benefitting by bargaining with a third party to
6 acquire a service release premium via wire funds transfer to table fund the purported
7 loan at the closing using a warehouse line of credit." (*Id.* at ¶ 64.) The Court is unable to
8 decipher the meaning of Plaintiffs' third statement, but from the first two statements the
9 Court gathers that Plaintiffs are attempting to allege that the terms of their original
10 contract with H&R Block in 2006 did not adequately inform them of the contractual
11 language's consequences. However, the complaint itself fails to make this clear, as
12 Plaintiffs fail to point to specific provisions in the original contract with H&R Block nor do
13 they state that their subsequent interest rates surprised them or that H&R Block induced
14 them to enter into a mortgage they could not actually afford based upon their FICO
15 scores or a failure of H&R Block to follow proper underwriting standards. Therefore,
16 Plaintiffs fail to allege sufficient facts to establish a claim for unconscionable contract
17 against H&R Block.

18 Moreover, the first notice of default was entered in 2010, ostensibly putting
19 Plaintiffs on inquiry notice of any unconscionability of their original contract's terms.
20 Based on these facts, the claim is time-barred; thus, amendment is futile.

21 This claim is therefore dismissed with prejudice.

22 **3. Breach of Contract**

23 In Plaintiffs' third claim, they allege that Defendant H&R Block and MERS failed
24 to properly "satisfy, release and reconvey the beneficiary security interest in Plaintiff's
25 [DOT]" in violation of Paragraph 23 of the "mortgage contract." (ECF No. 1 at ¶¶ 68-69;
26 see *also* ECF No. 9-1 at 14.¹⁰) However, a deed of trust is not a contract between a

27 ¹⁰Attached to Defendants' MTD is a copy of the DOT. Because Plaintiffs did not
28 object to the authenticity of this document, the Court takes judicial notice of it. *See Lee v*
(*fn. cont...*)

1 borrower and lender; rather, it is a document conveying an interest in real property as
2 security for performance of an obligation under a contract. See RESTATEMENT (THIRD)
3 OF PROPERTY (MORTGAGES) § 1.1 (AM. LAW INST. 1997); see also § 1.2 cmt. a (“A
4 [deed of trust] is a conveyance” and “is merely security” that does not require
5 consideration). Therefore, this claim is dismissed with prejudice.

6 **4. Breach of Fiduciary Duty**

7 In Plaintiffs’ fourth claim for breach of fiduciary duty, they contend that H&R Block
8 failed to “meet their fiduciary duty to satisfy, release and reconvey the Real Property
9 Lien Deed of Trust” and did not act in the “best interest of the grantor of the deed of
10 trust.” (ECF No. 1 at ¶¶ 75-77.) To the extent this claim purports to state that H&R Block
11 owed a fiduciary duty to Plaintiffs to “satisfy, release and reconvey” the DOT and to do
12 so in compliance with the covenants of Paragraph 23 of the DOT, this claim fails as a
13 matter of law. Generally, in Nevada, a lender in an arm’s length loan transaction does
14 not have a fiduciary relationship with a borrower such that it has particular fiduciary
15 duties to the borrower. See *Eruchalu v. U.S. Bank, Nat’l Ass’n*, No. 2:12-cv-01264-
16 MMD-VCF, 2013 WL 6667702, at *9 (D. Nev. Dec. 17, 2013).

17 Therefore, this claim is dismissed with prejudice.

18 **5. Quiet Title and Slander of Title**

19 Plaintiffs’ fifth and sixth claims for relief both allege that Defendants have no legal
20 right or perfected security interest in the Property and that there are unrecorded “secret
21 liens” never submitted for “recordation.” (ECF No. 1 at 17-19.) Because both of these
22 claims are predicated on Plaintiffs’ theory that Defendants do not have standing to
23 foreclose upon the Property because of improper assignment and/or securitization of
24 their mortgage loan, the Court has already found that Plaintiffs do not have standing to
25 make these claims.

26

 (...fn. cont.)

27 *City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (on a motion to dismiss a
28 court may properly look beyond the complaint to matters of public record without
converting a Rule 12(b)(6) motion into one for summary judgment).

1 The Court therefore dismisses these claims with prejudice.

2 **6. Civil Conspiracy, Federal & Nevada RICO**

3 In Plaintiffs' claim for civil conspiracy, they contend that Defendants had a series
4 of agreements to "convolute the ownership, if any, in the Loan" "while collecting as
5 much insurance proceeds upon the Loan as possible" such that "the judicial process is
6 being abused through a fraudulent . . . or otherwise wrongful foreclosure on the Home."
7 (ECF No. 1 at ¶ 105.) By contrast, in Plaintiffs' tenth and eleventh claims brought under
8 the federal and state RICO, they merely state the legal elements of a claim for relief
9 under the federal and state RICO statutes. (ECF No. 1 at 22-24.) Defendants note that
10 these claims must meet the heightened pleading requirements of Rule 9(b) and that
11 Plaintiffs have failed to meet this standard. (ECF No. 9 at 12-13.) The Court agrees.
12 Moreover, because the basis for these claims relate to improper securitization and
13 assignment of Plaintiffs' mortgage loan, these claims fail as a matter of law and are
14 dismissed with prejudice.

15 **7. Remaining Claims**

16 Plaintiffs' two remaining claims are for injunctive and declaratory relief. (ECF No.
17 1 at 19-21.) Because the claims upon which injunctive and declaratory relief are
18 predicated have been dismissed with prejudice, the Court also dismisses these claims
19 with prejudice.

20 **IV. CONCLUSION**

21 The Court notes that the parties made several arguments and cited to several
22 cases not discussed above. The Court has reviewed these arguments and cases and
23 determines that they do not warrant discussion as they do not affect the outcome of the
24 parties' motions.

25 It is therefore ordered that Defendants' Motion to Dismiss (ECF No. 9) is granted,
26 and Plaintiffs' complaint is dismissed with prejudice.

27 It is further ordered that Plaintiff's Motion for Temporary Restraining Order (ECF
28 No. 3) is denied as moot.

1 The Clerk is directed to enter judgment in accordance with this Order and close
2 this case.

3 DATED THIS 11th day of December 2017.

A handwritten signature in blue ink, appearing to read 'Miranda M. Du', is written over a horizontal line.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE